

Reaching Closure

Effective Project Completion and Closeout

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Clinic Goals

- What are the components of a whole construction project?
- What are the legal implications?
- What are the requirements?
- What resources are available to support success?

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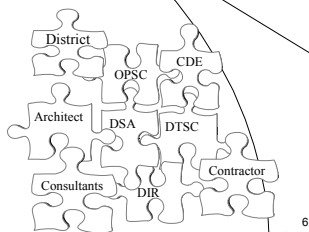
Agenda

- Typical school construction project overview
- Legal completion and close-out requirements
- DSA Final Certification Requirements
- OPSC 50-06 and Expenditure Audits
- Project organization and Accounting tools
- Questions and answers

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Typical School Construction

- Pre-design
- Design
- Construction



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Pre-design

- Identifying **what** is needed
- **When** it is needed
- **How** to meet the need

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What, When and How?

- Long Range Facility Plan
 - Basis for planning facilities opening and closing of schools
modernization of schools
 - Offers alternatives in allocating facility resources to achieve the
district's goals and objectives
- Master Plan
- Needs Assessment

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Design

- Site Acquisition
 - Local agencies, CDE and DTSC
- Architectural Plans and Specifications
 - CDE and DSA
- Funding
 - OPSC

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Construction

- Bid packages
- Contractor pre-qualification
- Bid award
- Notice to proceed
- Payment request
- Change orders
- Notice of completion

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Legal Requirements

Three Phases of Project

- Design.
- Construction.
- Closeout and claims.

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Manage the Construction to Prevent, Minimize and Resolve Disputes

- Number One Goal: Get the work done ASAP.
 - You can always fight over the money later.
- Number Two Goal: Document the disputes.

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Construction Project Management

- Pursuant to Education Code § 17019.3, a school district may contract for construction project management services

- Advantages
- Disadvantages

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Document the Project

- Maintain all critical construction management documents:

- All meeting minutes.
- Daily logs and monthly reports.
- Correspondence.
- Critical start and finish dates for work items.

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Lack of Progress in the Work

- Liquidated damages and early completion incentives:

- Good contract language.
- Don't waive it during the project.

- Withhold payments.
- Notice of intent to terminate.

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Termination and/or Abandonment

- Termination.
- Abandonment and bankruptcy.
- Negotiating with the surety.

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Stop Work Orders

- Education Code § 17307.5, the DGS may issue a stop work order when construction work is not being performed in accordance with law.
- Construction of incidental additions may continue.
- School district is not liable for action filed by contractor for delays caused by the stop work order, unless the district is the basis for the issuance of the stop work order.

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Acceptance of Work/DGS Approval for Occupancy

- Separate timeline from final payment.
- Accept work when it is complete.
- Coordination/inspection by DGS.
 - Per Ed. Code §17314—any school building approved by the DGS shall be deemed to meet the local building requirements.
 - Ed. Code §17315—DGS Certificate of Compliance.

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Prompt Payment Requirements

- Progress payments:
 - Contractor needs payments regularly.
 - Public Contract Code Section 20104.50.
 - 10% interest penalty.

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Prompt Payment Requirements (cont.)

- Retention payments:
 - Can no longer withhold retention as leverage to force contractor to settle.
 - Public Contract Code Section 7107.
 - Must pay all retention within 60 days of "completion."
 - "Retention" includes unearned and unbilled amounts.
 - Can still withhold 150% for disputed items.
 - 24% interest penalty.

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Prompt Payment Requirements (cont.)

- Retention payments (cont.):
 - "Completion" defined four ways:
 - Occupation, beneficial use, and enjoyment **accompanied by** cessation of labor.
 - Acceptance.

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Prompt Payment Requirements (cont.)

- Retention payments (cont.):
 - Cessation of labor for 100 continuous days due to factors beyond control of contractor.
 - Cessation of labor for 30 continuous days of Notice of Cessation or Completion is filed.

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Final Payments

- Record Notice of Completion and wait for final stop notices.
- Resolve as many disputes as possible.
- Send final accounting letter and make final payment.
- Remaining disputes.

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Bonus For Early Completion— Gov't Code § 17019.3

- A public entity can contract for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time.
- Such a provision must be included in the specifications upon which proposals or bids are received, which specifications shall clearly set forth any liquidated damages provisions.

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Releases

- Public Contract Code Section 7100.
- Change orders.
- Final payment release:
 - Not automatic upon final payment.
- Mutual release.

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Claims by Contractor

- Cost of extra work.
- Cost of delay.
- Interest for late payments.
- Subcontractor pass-through claims.

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Claims by Public Entity

- Actual and Liquidated Damages.
- Indemnity.
- Negligence, Fraud and Misrepresentation.
- Punitive damages.
- RICO, Unfair Business Practices.
- Debarment.

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Claims by Public Entity (cont.)

- False Claims Act violation:
 - Government Code section 12650 et seq.
 - No specific intent to defraud needed!
 - Treble damages.
 - \$10,000 civil penalty for EACH violation.
 - Mandatory duty to investigate.
 - Will inflame litigation.

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Preparation for, and Handling of, Disputes

- Document the dispute as it happens.
- Get experts and attorneys involved early to advise.
- Mediation or arbitration during construction.

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Claims Process

- Contractual claim requirements:
 - Notice of claim requirements.
 - Claim and response requirements:
 - Right to demand backup documentation.
 - Right to audit.
 - Define claim.

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Claims Process (cont.)

- Statutory requirements for claims under \$375,000.
- Government Code claims.
- Aggressive defense of claims.

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Alternative Dispute Resolution

- Statute requires ADR for claims of \$375,000 or less:
 - Public Contract Code section 20104.4.
- Modified arbitration clause permitted in a construction contract.
- Dispute Review Board.

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D.S.A. Certification

- Education Code § 17315 (a) – DSA will issue a letter of certification after all documents have been accepted
- Projects closed with or without certification
- Four types of closing letters
- Consequences of closing without certification

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Responsibilities

- 2001 California Building Standards Administrative Code
- Inspector
- Architect
- Testing Laboratory
- Engineers
- Contractor
- School District
- D.S.A.

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D.S.A. Closing Process

- List of documents required at plan approval
- 90 Day letter
- Extensions
- Closing Letter (as discussed above)
- Re-opening closed files

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Required Documents

Forms are one page each and simple

PRIOR TO START OF CONSTRUCTION

- DSA-5 Inspector qualification form
- DSA-102 Contract information form
- Addenda

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Required documents - continued

- **DURING CONSTRUCTION**
- DSA approval of :
 - Change Orders
 - Deferred approval
 - Revisions and other misc. construction documents
- Resolution of:
 - D.S.A. Field trip note issues
 - Testing Lab deficiencies

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Required documents -continued

DURING CONSTRUCTION

- * **Laboratory reports**
- * **Inspector semi-monthly reports**

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Required documents - continued

AFTER COMPLETION OF CONSTRUCTION

- * DSA-6 Inspector's Verified Report
- * DSA-6 Architect's Verified Report
- * DSA-6 Engineer's Verified Report
- * DSA-6 Contractor's Verified Report
- * Laboratory Affidavit
- * Special Inspection Affidavits
- * Notice of Completion

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Common Pitfalls

- Document never submitted to D.S.A.
- Document rejected by D.S.A.
- Education Code § 17315 (b) allows D.S.A. to certify without receipt of all required documents when documentation is unavailable

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Suggestions for Achieving Certification

- Identifying and discussing responsibilities
- Including regulatory responsibilities as a condition of contract
- Keeping complete records
- Arranging a closing meetings with D.S.A. (particularly on larger projects)

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OPSC Requirements

- 50-06 final report for close-out
- Timelines –
 - 18 months from date of SAB approval to let 50% contract
 - Fund release
 - Progress reports / Final report

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How to be prepared for an audit

1. RFP
2. Bid process –competitively bid & DVBE met
3. Contracts (award letters & notice to proceed)
4. Board authorizations
5. Invoices & warrants (pay requests)
6. Change orders
7. Notice of Completion (filed with County)
8. Worksheets with detail for final report
9. Other documentation
 - * LCP approval & Third party contract
 - * Documents supporting prevailing wages

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Resources to help prepare for audit

www.opsc.dgs.ca.gov

- School Facility Program
 - Substantial Progress & Expenditure Audit Guide
 - May/2003
 - * SFP Allowable expenditures
 - * SFP Ineligible expenditures

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Organize, Organize, Organize

- Qualifying Consultants and Set Up of Contracts Early in the Process
- Administration of Contracts Between Departments: Who's Monitoring What?
- Master Project Files: Why Organize?
- Accounting Files Separate from Master Project Files
- Do It Early or Pay Later

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Accounting Tools

- Tracking System for Contracts, Purchase Orders, Invoices and Warrants
- Project Budgets and Expenditures
- Cashflow and Revenue Sources
- Excel or Other Software Tools
- Don't Forget: Reconciliation with District Accounts, Funds and Year End Close-Out

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Recap brainstorming questions

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Share participant experiences / resources

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